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NO. 621

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

John R. Pennington, et al,

Appellants,

v.

City of Corpus Christi, et al,

Appellees.

On Appeal From the Court of Civil Appeals
for the Fourth Supreme Judicial District
of Texas, Sitting at San Antonio, Texas.

APPELLANTS' REPLY TO APPELLEES' MOTION
TO DISMISS APPEAL.

To the Supreme Court of the United States:

Now come John R. Pennington, et al, appellants in this suit and in reply to the Motion to Dismiss say:

If it were not for the fact that the appellees have filled their Motion to Dismiss with inaccurate statements appellants would not bother the Court with an answer thereto. The Motion to Dismiss is full of incorrect statements as to the record in this case. We will not burden the Court with references to all such statements but will use two or three as examples of misstaments so made. One very untrue statement appears on pages 6 and 7 of the motion saying: "At the outset, we charge that this appeal has been frivolously brought." (Emphasis added) This record refutes as incorrect and untrue said statement.

The next such statement appears on pages 13 and 14 of the Motion, saying: "The one question is very general and the other is somewhat more SPECIFIC, BUT BOTH OF THEM SIMPLY CHARGE THAT THE ANNEXATION WAS ARBITRARY, UNREASONABLE AND UNJUST. This same charge is contained in Appellants' Notice of Appeal to this Court

and in their pleadings in the Trial Court, where it was treated as one proposition. Also, it is found as one proposition in Appellents' Motion for Rehearing in the Court of Civil Appeals. The fact remains, however, that such charge was not, in any sense, contained in Appellants' Brief in the Court of Civil Appeals." The quotation in caps shows that the appellees and the Courts below understood the charge. The underlined portion of the quotation is not true. The proposition was fully discussed in the appellants' brief in the Court below and in their motion for rehearing in the Courts below. Those instruments are before this Court for inspection. On page 49 of the Appellants' Brief in the Court of Civil Appeals this is said:

> ". . . We have shown that the issue submitted covers the good faith question as well as other questions on the arbitrary acts of the Council. .. .

"We have said before, this suit was filed by the appellees, and even had the court had jurisdiction to try the case, the burden of proof was on the appellees to prove their case, including the validity of the ordinances.

"' It has been said that even though an ordinance is amendatory of a comprehensive zoning ordinance, it ispresumed to be valid. But of course that presumption is rebuttable. . . that presumption disappears when the facts show and it was determined by the court that the city acted arbitrarily, unreasonable and in abuse of discretion.' Bliss v. City of Fort Worth, 288 S. W. 2d 558, 563; Weaver v. Ham, 149 Tex. 309, 232 S W 2d 704,709.'

"The finding of the jury that the acts were unjust, unreasonable and arbitrary des-

troyed the presumption of validity of the 'assumed jurisdiction'".

A full discussion of the same subject is found on page 6 of the Motion for Rehearing in the Court of Civil Appeals. The facts are that the entire question was carried in the case from the first amended original answer of the appellants to this very moment in all pleadings, briefs, motions and applications required by the law.

The Appellees herein complain about "Point Five" but say nothing to speak of about the other points carried in the record. The Court of Civil Appeals considered the points in order, and so did the Appellees, for in that Court no objections were made, urged or sustained to any of the "POINTS OF ERROR' presented by the Appellants in the Court below. The Court of Civil Appeals considered and passed upon all the "points presented" saying:

"We have examined other points presented by appellants and find them without merit, therefore, they are overruled." (Jurisdictional Statement page 35).

The Appellees have written a lot about "assignments of error". This Court in section 4 of Rule 10 abolished "assignments of error" long ago in 1954. The Rules of Civil Procedure of Texas also abolished "assignments of error".

In People of State of New York et rel Bryant v. Zimmerman et al, 278 U S 63, 49 S Ct. 61 at 63, this Court says:

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but

only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

This record and the Jurisdictional Statement show that the constitutional question was fully presented to the courts below and ruled on by them contrary to the claim. The Motion to Dismiss should be overruled.

Respectfully submitted,

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I, Sidney P. Chandler, the attorney of record for John R. Pennington, et al, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of December, 1963, I served a copy of the foregoing Reply to Motion to Dismiss on the Appellees by depositing the same in the United States Mail in the Postoffice in Corpus Christi, Texas, duly addressed to Honorable I. M. Singer, Esq., City Hall, Corpus Christi, Texas, one of the Attorneys of record for the Appellees, with first class postage paid.

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